

APPENDIX

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BIA.IA.0600

April 8, 1988

Patrick Andreotti, Esquire
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Re: Appeal of Portland Area Director's decision affirming the Yakima Agency Superintendent's denial of applications by Philip Brendale, Gary Gwinn and Larry Boyd for permits to use BIA roads

Dear Mr. Andreotti:

This letter is the decision of the Assistant Secretary—Indian Affairs on your appeal dated May 2, 1986, from the decision of the Portland Area Director of the Bureau of Indian Affairs affirming the decision of the BIA Yakima Agency Superintendent to deny the applications for road use permits by your clients, Philip Brendale, Gary Gwinn and Larry Boyd, based on a determination by the Yakima Tribal Zoning Administrator that your clients are in violation of the zoning regulations of the Yakima Indian Nation. For the reasons set out below, I have concluded that BIA officials are not authorized to deny access to the roads involved in this appeal because of alleged violations of tribal zoning laws.

On May 3, 1972, the Superintendent of the Yakima Agency issued a public notice closing most of the roads in a portion of the Yakima Indian Reservation to public travel. That notice stated the reasons for the closure:

The closure is necessary to carry out the provisions of the Treaty which set aside the Reservation for the exclusive use and benefit of the Yakima Nation; and to protect the public safety, prevent and suppress

fires, protect tribal fish and game and other resources, and protect unstable road beds, pursuant to 25 CFR 162.6 [now 25 CFR § 170.8 (1927)].

The notice stated that, except for tribal members, no one could use the roads without a permit issued by the Yakima Indian Nation and the BIA. It also announced that permits would be issued only to property owners in the closed area, persons employed by or doing business with the BIA or the Yakima Nation, "and to others who are engaged in activities of direct benefit to the Yakima Nation".

On August 19, 1974, the United States sued one of the appellants, Mr. Brendale, and his wife urging that they be enjoined from using the BIA roads because they refused to agree not to carry firearms into the closed area. Mr. Brendale, who is not a member of the Yakima Nation, owned land within the closed portion of the reservation.

On September 30, 1977, the court granted the injunction. It concluded that, given that tribal members had hunting rights on the reservation that are not shared by non-Indians, it was reasonable for the BIA to prevent non-Indians from carrying firearms in the closed area. *United States v. Brendale*, No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977). The court cited *Superior Oil Co. v. United States*, 353 F.2d 34 (9th Cir. 1965), for the proposition that the BIA may restrict access by non-Indian landowners who have no easement across Indian lands. In that case, the BIA blocked access on the ground that the heavy equipment involved would cause damage to the unstable roadbed. *Id.* at 35-36.

In 1978, Mr. Brendale filed a new action alleging that he did have an easement over Indian lands. The court held that Mr. Brendale, his invitees, and his successors and assigns in interest had the right to use the BIA roads so long as that use is consistent with the reason-

able use of the land and so long as there have not been general access restrictions placed on the roads under 25 CFR § 170.8(a). *Brendale vs. Olney*, No. C-78-145 (U.S.D.C. E.D. Wash., March 3, 1981).

Section 170.8(a) provides that BIA roads are, in most instances, open to the public:

Free public use is required on roads eligible for construction and maintenance with Federal funds under this part. When required for public safety, fire prevention or suppression, or fish or game protection, or to prevent damage to unstable roadbed, the Commissioner may restrict the use of them or may close them to public use.

In 1983, Congress amended the term "Indian reservation roads" in the Federal-Aid Highways Act to include public roads only. 23 U.S.C. § 101(a). H. Rep. No. 97-555, 97th Cong., 2d Sess. 129 (1982).

In 1983, the Yakima Indian Nation filed another action in federal court seeking an injunction preventing Yakima County officials from authorizing Mr. Brendale to develop his property in a manner contrary to the Yakima Nation's zoning ordinance. The Yakima Nation prevailed in the federal district court and that decision was recently upheld on appeal. *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987) (*Whiteside*).

On December 19, 1984, you wrote the Yakima Agency Superintendent that Mr. Brendale had sold a portion of his property in the closed area to Gary Gwinn and leased another portion to Larry Boyd. You asked the Superintendent to issue road use permits to both Mr. Gwinn and Mr. Boyd. On December 24, 1984, the Superintendent requested the Yakima Nation Zoning Administrator to review your request "for compliance with Tribal Zoning". On January 23, 1985, the Zoning Administrator

wrote the Superintendent that subdivision of Mr. Brendale's property violated the tribal zoning ordinance.

The Superintendent denied your request by letter dated February 15, 1985. He asserted, based on the March 2, 1981, decision in *Brendale vs. Olney*, that the right to use BIA roads as access to the Brendale property was contingent on that property being used in a reasonable manner. He accepted the Zoning Administrator's determination as establishing that the property was being used in violation of tribal zoning laws and concluded that such use is unreasonable.

On April 12, 1985, you appealed the Superintendent's decision to the Portland Area Director, but asked for a stay pending the district court decision in the *Whiteside* case. The district court ruled for the Yakima Tribe in that case on September 11, 1985. *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735 (E.D. Wash. 1985). The Area Director affirmed the Superintendent's decision on March 3, 1986, and you appealed to this office on May 2, 1986. The district court decision in *Whiteside* was affirmed by the Ninth circuit on September 21, 1987.

The decision of both the Superintendent and the Area Director are based on a negative implication from the 1981 federal district court ruling in *Brendale v. Olney*, which provided that Mr. Brendale could use the BIA roads so long as his use was consistent "with the reasonable use of the land". Both the Superintendent and Area Director conclude that if Mr. Brendale is found to be using his land in an unreasonable manner, he no longer has the right to use the BIA roads.

The Court, however, did not address the fact that the BIA regulations mandate "free public use" of BIA roads. 25 CFR § 170.8(a). After the court ruled, Congress provided in 1983 that federally-funded Indian reservation roads must be public roads. 23 U.S.C. § 101(a). If a

road is a public road a traveller need not have an easement in order to use it. See *Grosz v. Andrus*, 556 F.2d 972 (9th Cir. 1977); *United States v. 10.0 Acres*, 533 F.2d 1092 (9th Cir. 1976); *United States v. City of Tacoma*, 330 F.2d 153 (9th Cir. 1964).

The only reasons for which the BIA may close a public road or restrict access to it are set out in 25 CFR § 170(a).

Significantly, the only federal court cases of which we are aware in which the court upheld a BIA closure of a public road involved closures for one of the purposes listed in § 170.8(a). In *Superior Oil Co. v. United States*, the public road was closed to prevent damage to an unstable roadbed. In *United States v. Brendale*, No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977), persons who were not authorized to hunt game were prohibited from carrying firearms on BIA roads.

Because the enforcement of tribal zoning laws is not among the permissible reasons for the BIA to restrict access to a public road listed in § 170.8(a), the decisions of the Area Director and the Superintendent to prohibit your clients from using BIA roads to gain access to their property are reversed. This decision is final for the Department.

Sincerely,

JAMES S. BERGMANN
Acting Assistant Secretary
—Indian Affairs